C. Proceedings Before the District Court

On May 6, 2004, Citigroup removed this action from the Illinois Circuit Court, Madison County, to the United States District Court for the Southern District of Illinois on four independent grounds, including the ground that SLUSA authorized removal of the action.[2]

Petitioner moved before the district court for remand of the action to state court. *See* C.A. App. 102-04. Among the principal issues relating to SLUSA before the district court was the interpretation of the phrase "in connection with the purchase or sale of a covered security," as that phrase appears in SLUSA's prohibition on the maintenance of certain state-law class actions. 15 U.S.C. § 78bb(f)(1)-(2); *see id.* § 77p(b)-(c). Petitioner and Citigroup agreed before the district court, and agree before this Court, that this phrase should be construed in accordance with the parallel phrase in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See* C.A. App. 546, 552-53. The parties disagree, however, about how Section 10(b) and Rule 10b-5 should be interpreted.

Petitioner contends that the "in connection with" language of Section 10(b) and Rule 10b-5 incorporates the standing rule of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 732 (1975), under which only a purchaser or seller of the relevant security has standing to bring a private right of action for damages under Section 10(b) and Rule 10b-5. On that view, SLUSA does not bar class actions brought solely on behalf of holders, rather than purchasers and sellers, of securities.

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[2] *See* Separate Appendix of Defendant-Appellant [Citigroup] in the court below ("C.A. App.") 48-51 (¶¶ 32-40).

Citigroup's view, in contrast, is that "[t]he purchaser/seller standing limitation in Rule 10b-5 damages actions . . . does not stem from a construction of the phrase 'in connection with the purchase or sale of any security.'" *Holmes* v. *Investor Prot. Corp.*, 503 U.S. 258, 284 (1992) (O'Connor, J., concurring). That standing rule instead reflects policy-driven limitations imposed by this Court on the private right of action the Court created by implication under Section 10(b). The "in connection with" requirement of Section 10(b) and Rule 10b-5 — and consequently the parallel requirement in SLUSA — is satisfied when purchases and sales of securities "coincide" with the relevant misrepresentations, omissions, or manipulations within the meaning of *SEC* v. *Zandford*, 535 U.S. 813, 825 (2002).[3] That requirement does not imply that the plaintiffs (or the members of the putative class) in an action alleged to be barred by SLUSA must themselves be purchasers or sellers. On this view, SLUSA bars class actions brought on behalf of persons alleging that they held securities in reliance on misrepresentations, omissions, or manipulations that coincided with securities transactions by others, so long as the class action otherwise falls within SLUSA's prohibition.

On August 9, 2004, the district court heard oral argument on the motion to remand. C.A. App. 528. The district court indicated at the oral argument that it did not believe SLUSA bars class actions alleging holder claims. *Id.* at 555. The district court, noting that it was "construing the statute narrowly," initially indicated at the oral argument that it would subsequently enter an order remanding the action for lack of subject matter jurisdiction. *Id.* After the district court so stated, counsel for the parties debated before the district

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[3] *See generally* Brief for the United States as Amicus Curiae Supporting Petitioners in No. 04-1371, at 10-14.

court the effect of the Seventh Circuit's decision in *Kircher* v. *Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004) ("*Kircher I*"), *cert. granted*, 126 S. Ct. 979 (2005) (No. 05-409), which the district court undertook to read before issuing a written order deciding petitioner's motion to remand. C.A. App. 555-57.

The next day, the district court entered a written memorandum and order granting petitioner's motion and remanding the action to the Illinois Circuit Court, Madison County. *See* Pet. App. 13a-14a. That memorandum and order, which is the definitive statement of the district court's ruling, did *not* remand the action for lack of subject matter jurisdiction. To the contrary, the district court held, in accordance with *Kircher I*, that "[r]emoval was proper in the first instance as SLUSA contemplates that the district court is the proper judicial authority to determine whether this case is covered by the statute." *Id.* After finding that removal was proper, the district court ruled that SLUSA required remand of the action. *Id.* The district court's memorandum and order noted that in that court's view, "this case does not involve misrepresentation or omissions of material fact 'in connection with the purchase or sale of a covered security'" within the meaning of SLUSA. *Id.* at 14a. The assertion in the petition that the district court "remanded the action to state court for lack of subject matter jurisdiction" (Pet. 8) is thus not accurate.

D. Proceedings Before the Seventh Circuit

Citigroup appealed from the district court's remand order to the Seventh Circuit. On August 17, 2005, a unanimous panel of the Seventh Circuit vacated the district court's order and directed the district court to dismiss petitioner's claims as barred by SLUSA. Pet. App. 11a.

The Seventh Circuit, relying on its prior decision in *Kircher I*, first rejected petitioner's claim that it lacked appellate jurisdiction. In *Kircher I*, the Seventh Circuit had confronted an appeal from an order by a district court remanding an action to state court under SLUSA. The district court in *Kircher I* had based its remand order on its finding that the complaint did not allege a misrepresentation, omission, or manipulation "in connection with the purchase or sale" of a covered security. *See* 373 F.2d at 848. The Seventh Circuit held in *Kircher I* that such an order by a district court cannot properly be characterized as an order remanding the action for lack of subject matter jurisdiction. Such a ruling instead depends on application of the substantive rule set forth in SLUSA barring certain state-law class actions, which the Seventh Circuit viewed as a ruling on the merits, rather than on an issue of subject matter jurisdiction. *See id.* at 849-51. For that reason, *Kircher I* decided that such an order by a district court may be appealed, notwithstanding the provisions of 28 U.S.C. § 1447(d). That statute, as interpreted by this Court, generally bars appeals from an order by a district court remanding an action for lack of subject matter jurisdiction. *See Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976); *see also Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995).

In the opinion below, the Seventh Circuit then turned to whether SLUSA prohibits the maintenance of petitioner's class action. On that issue, the Seventh Circuit followed its prior decision in *Kircher* v. *Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) ("*Kircher II*"), *cert. granted as to another issue,* 126 S. Ct. 979 (2005) (No. 05-409). In *Kircher II*, as summarized in the opinion below, the Seventh Circuit had ruled that "SLUSA's 'in connection with the purchase or sale of a covered security' requirement does not incorporate the

Blue Chip Stamps standing rule." Pet. App. 9a (citing *Kircher II*). As the *Kircher II* court observed,

> Section 10(b) defines a federal crime, and it also permits the SEC to enforce the prohibition through administrative proceedings. Invocation of this anti-fraud rule does not depend on proof that the agency or United States purchased or sold securities; instead the "in connection with" language ensures that the fraud occurs in securities transactions rather than some other activity.

403 F.3d at 483 (citations omitted). As *Kircher II* explained, Section 10(b) and Rule 10b-5 do not require that the plaintiff be a purchaser or seller in the context of actions by the government. And the same language in the same statute and rule cannot coherently mean one thing when invoked by the government, and something quite different when invoked by a private plaintiff. *See id.* at 484.

Kircher II also explained that interpreting SLUSA to prohibit the maintenance of otherwise barred class actions alleging holder claims furthers the purposes of the statute. The effort of plaintiffs there "to define non-purchaser-non-seller classes [was] designed to evade [the] PSLRA in order to litigate a securities class action in state court in the hope that a local judge or jury may produce an idiosyncratic award. It is the very sort of maneuver that SLUSA is designed to prevent." *Id.* As holder claims are especially subject to abuse, *see Blue Chip Stamps*, 421 U.S. at 734-35, it makes sense to interpret the prohibition in SLUSA to "cover[] both good and bad securities claims — *especially* bad ones," *Kircher II*, 403 F.3d at 484 (emphasis in original).

Applying the principles announced in *Kircher II*, the Seventh Circuit determined in the opinion below that petitioner's complaint alleged misrepresentations and

omissions "in connection with" securities transactions. Pet. App. 18a-19a (¶¶ 22-24). Accordingly, the Seventh Circuit found that SLUSA barred petitioner's class action. *Id.* at 10a-11a. It directed the district court to vacate its order of remand and dismiss the class action under SLUSA. The district court subsequently entered a judgment conforming to the Seventh Circuit's decision. *Id.* at 12a.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD RULE IN *DABIT* THAT SLUSA BARS CLASS ACTIONS ASSERTING HOLDER CLAIMS, AND SHOULD THEREFORE DENY CERTIORARI ON QUESTION 2

For the reasons stated in the merits briefs filed in *Dabit* by petitioner Merrill Lynch, Pierce, Fenner & Smith Inc., by the United States as amicus, and by the other amici supporting Merrill Lynch, this Court should rule in *Dabit* that SLUSA prohibits the maintenance of class actions brought by holders of covered securities that otherwise fall within the scope of SLUSA's prohibition. More specifically, the Court should rule that the phrase "in connection with the purchase or sale" of a covered security does not require that the particular plaintiffs (or the members of the putative class) in a state-law class action qualify as purchasers or sellers. The requirement imposed by that phrase is instead satisfied when purchases or sales of securities "coincide" with alleged misrepresentations, omissions, or manipulations within the meaning of *SEC* v. *Zandford*, 535 U.S. 813, 825 (2002), even if the plaintiffs or putative class members in the class action at issue are not purchasers or sellers. *See also supra* note 3.

In this brief, however, Citigroup does not argue the merits of this issue or, as stated below, the jurisdictional issue presented in *Kircher*. This Court will resolve those issues in *Dabit* and *Kircher*. Citigroup therefore confines this brief to

arguments relating to issues other than those presented by the petitions in *Dabit* and *Kircher*.

Citigroup does, however, take issue with petitioner's suggestion that the Seventh Circuit went "further" in this case than it had done in *Kircher*. Pet. 3. According to the petition,

> [W]hen an investment adviser like Citigroup advises its clients to continue *holding* certain stocks, there is absolutely no "purchase or sale" of a security to which the adviser's conduct could conceivably be "connected." . . . By eliminating the requirement of any purchase or sale, the Court below literally expunged the "purchase or sale" language in SLUSA . . . .

Id. (emphasis in original).

This case, however, is not about advice by Citigroup that was somehow relevant to the holding of securities, but not to purchases or sales of securities. To the contrary, petitioner's complaint described Citigroup's allegedly false ratings as "investment ratings which [Citigroup] used to make recommendations to its customers regarding *the purchase and sale of stock* in publicly traded companies." Pet. App. 17a (¶ 12) (emphasis added). Furthermore, although petitioner's complaint contains scant allegations concerning damages, a fundamental premise of holder claims such as those advanced by petitioner is that if Citigroup had assigned appropriately negative ratings to the stocks in question, putative class members would have sold the stocks.[4] That

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[4] *Cf.* Pet. App. 18a-19a (¶¶ 22-23) (alleging Citigroup knew that a negative rating on a stock would make its customers more likely "to eliminate that stock from their investment portfolio"). *See generally Crocker* v. *FDIC*, 826 F.2d 347, 351 (5th Cir. 1987) (noting that it is "implicit" in holder claim that if truthful information had been disclosed,

premise obviously concedes the influence of the ratings in question on securities transactions. *See also Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 300-05 (3d Cir. 2005) (noting inherent connections between alleged scheme involving biased stock ratings and the purchase and sale of securities). If petitioner were right in suggesting that Citigroup's advice was unrelated to *anyone's* purchase or sale of securities, it would apparently follow that even if petitioner's charges were true (which Citigroup categorically denies), the SEC would be unable to bring an enforcement action under Section 10(b) based on those charges. That could not be the law.

"an entire class of shareholders [would have] simultaneously dumped their stock on the market"); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in No. 04-1371, at 24 (explaining that holder claims "impl[y that] shareholders would have sold their shares had accurate information been released to the market").

II. THIS COURT SHOULD DENY CERTIORARI ON THE JURISDICTIONAL ISSUE PRESENTED IN QUESTION 1

A. This Court Should Rule in *Kircher* that a Court of Appeals May Review an Order Remanding an Action to State Court Based on the "in Connection with" Requirement

As the Seventh Circuit held in *Kircher* and in the opinion below, a court of appeals may properly review a district court's order remanding an action to state court, where the remand order is based on the district court's finding that plaintiff has not alleged a misrepresentation, omission, or manipulation "in connection with the purchase or sale" of a covered security as that phrase is used in SLUSA's prohibition on the maintenance of certain state-law class actions. 15 U.S.C. § 77p(b); *see id.* § 78bb(f)(1). This Court will decide that issue in *Kircher* v. *Putnam Funds Trust*, No. 05-409 (certiorari granted Jan. 6, 2006), and accordingly, for reasons already indicated, we do not argue the merits of the issue here.

B. If this Court Rules in *Dabit* that SLUSA Bars Class Actions Asserting Holder Claims, the Court Should Deny Certiorari in this Case Regardless of the Outcome in *Kircher*

Citigroup acknowledges that this case should be held pending this Court's decision in *Dabit*. If the Court agrees with the Seventh Circuit's position on the *Dabit* issue, the Court should deny certiorari in this case, regardless of the outcome in *Kircher*.

The question presented in *Dabit* and question 2 in the petition in this case raise exactly the same issue.[5] Each question asks, in substance, whether SLUSA bars class actions asserting claims by holders of securities that otherwise fall within SLUSA's prohibition. The petition in this case correctly states that in *Dabit*, "[t]he Second Circuit rejected the precise argument endorsed by the Seventh Circuit" in the opinion below. Pet. 22. For that reason, if this Court rejects the position of the Second Circuit, and rules in *Dabit* that SLUSA does bar such class actions asserting claims by holders, the disposition of this case in the courts below was necessarily correct. The Seventh Circuit directed dismissal of petitioner's class action pursuant to SLUSA. Pet. App. 10a-11a. On remand from the Seventh Circuit, the district court entered judgment dismissing the class action. *Id.* at 12a. If *Dabit* confirms the Seventh Circuit's interpretation of SLUSA, the courts below reached the proper result, and certiorari should be denied.

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[5] The question presented in *Dabit*, as framed by respondent in *Dabit*, is "[w]hether [SLUSA] preempts claims brought by holders of securities based upon misrepresentations, omissions, or manipulation, notwithstanding SLUSA's language limiting preemption to claims 'in connection with the purchase or sale of a covered security,' and this Court's interpretation of identical language to cover only claims brought by purchasers or sellers in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)." Brief for Respondent in No. 04-1371, at i. Question 2 in the petition in this case is "[w]hether the court of appeals erred in holding, in acknowledged conflict with three other circuits, that SLUSA preempts all claims brought by holders of securities, notwithstanding SLUSA's language limiting preemption to claims alleging 'an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security' or the use of 'any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security,' and this Court's interpretation of identical language to cover only claims brought by purchasers or sellers in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)." Pet. i.

This Court, of course, has granted certiorari in *Kircher* to decide whether a court of appeals may review a district court's order remanding an action to state court under SLUSA based on an alleged failure to satisfy the "in connection with" requirement. If the Court gives a negative answer to that question in *Kircher*, it may follow that the Seventh Circuit lacked jurisdiction over Citigroup's appeal in this case. But it would *not* follow that this Court should grant certiorari, vacate the Seventh Circuit's judgment, and remand the case ("GVR") in light of *Kircher*. Such a remand from this Court to the Seventh Circuit would inevitably be followed by remand from the Seventh Circuit to the district court. If the Seventh Circuit was right on the substantive issue presented here — i.e., the *Dabit* issue — the district court would then be required to adhere to its existing judgment dismissing petitioner's putative class action, this time under compulsion not of the Seventh Circuit's ruling in *Kircher II*, but of this Court's ruling in *Dabit*.

Consequently, if the Seventh Circuit was right about the *Dabit* issue, remand of this case following this Court's decision in *Kircher* would serve no useful purpose, however *Kircher* may resolve the jurisdictional question there presented. The case would merely return to the district court for rejection, under *Dabit*, of any challenge to the existing judgment dismissing petitioner's putative class action. The only result of the remand would be delay and the imposition of burdens and avoidable expense on the litigants and the courts below.

In *Lawrence* v. *Chater*, 516 U.S. 163 (1996) (per curiam), this Court considered when it should GVR in response to an arguably relevant development (such as a decision by this Court) that occurred after the decision below. The Court stated that in that situation, it should GVR only, among other necessary conditions, "where it appears that

such a redetermination [by the lower court in light of this Court's decision] may determine the *ultimate outcome* of the litigation." *Id.* at 167 (emphasis added). The Court also noted that even if this and other necessary conditions are met, "[w]hether a GVR order is ultimately appropriate depends further on the equities of the case." *Id.* at 167-68. "[I]f the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. If the Seventh Circuit's view on the *Dabit* issue prevails, a GVR order in this case in light of *Kircher* could not affect the "ultimate outcome" of this case. And for that very reason, such a GVR order would also be inconsistent with the equitable considerations, such as delay and cost, discussed in *Lawrence.*

If the Court decides *Dabit* in accordance with the position of the Seventh Circuit's in the opinion below, the Court could properly deny certiorari in this case at once. Under such circumstances, no possible decision in *Kircher* would warrant a GVR order. Alternatively, under such circumstances this Court should hold the petition pending the decisions in both *Dabit* and *Kircher*, and should then deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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